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No. 99-1904

IN THE
Supreme Court of the United States

I & M RAIL LINK,
Petitioner,

v.

NORTHSTAR NAVIGATION, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae.* This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has refused consent.

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks to file a brief *amicus curiae* only when the case presents an

[1] The letter expressing consent has been filed with the Clerk of the Court.

issue of great significance to the railroad industry as a whole-and in those instances such requests have been granted.[2]

In this case, the court below has misconstrued a federal statute, the Truman-Hobbs Act, in a way that will greatly increase the liability exposure of railroads that own bridges over navigable waterways. This is a matter of industry-wide concern because railroads own hundreds of bridges, a significant number of which are or may be subject to the Truman-Hobbs Act. Thus, this case does not represent an isolated event. To the contrary, railroads (and other bridge owners) can expect to be exposed on a recurring basis to the additional liability that will flow from the decision below. Railroads view this case with particular alarm because the statute in question was primarily enacted for the purpose of relieving railroads from a then-existing, unfair financial burden, not to expose them to a new burden.

When AAR appears before a court as *amicus curiae* it brings a broad, industry-wide perspective to the issue. AAR works closely with its member roads on a host of liability issues, many of which arise under statutes that have been enacted to apply uniquely to railroads (e.g., the Federal Employers' Liability Act, 45 U.S.C. §§51-60[3] and the Federal Railroad Safety Act, 49 U.S.C. §20101 *et seq.*) or, as in this case, with the specific concerns of the railroads in mind. Because, as with the statute at issue here, liability rules covering the railroad industry often flow from federal laws of nationwide applicability, judicial interpretations of these rules

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[2] *E.g., Consolidated Rail Corp. v. Wicker,* 119 S.Ct. 530 (1998); *CSX Transp., Inc. v. Sirbaugh,* 117 S. Ct. 1289 (1997); *Norfolk & Western Ry. v. Chittum,* 117 S. Ct. 597 (1996); *Metro-North Commuter R.R. v. Buckley,* 117 S.Ct. 379-80 (1996). All granting motion of AAR to participate as *amicus curiae.*

[3] Through subsequent legislation, FELA was also made applicable to the maritime industry. 46 U.S.C. §688.

can impact multiple railroads. As a result, AAR plays a prominent role in advocating on behalf of the industry in these matters.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling, by bringing the perspective of an entire industry, which often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry.

This case, which arises out of an allision between a marine vessel and a bridge spanning the upper Mississippi River, has potentially serious consequences for railroad companies by virtue of their ownership of numerous bridges over navigable waterways. As a result of the decision below, whenever such a bridge has become subject to an "Order to Alter" under the Truman-Hobbs Act, 33 U.S.C. §§511-523, a long-standing admiralty rule that favors bridge owners will be eliminated. The purpose of the Truman-Hobbs Act, a law that provides federal money to renovate bridges when necessary to aid navigation, is to relieve bridge owners from the financial obligation to alter their property for the benefit of water carriers. The Seventh Circuit has improperly transformed this law, which was enacted solely to shield bridge owners from an undue financial burden, into a sword that can be used against bridge owners whenever their bridges are struck by a marine vessel.

AAR members will be directly and adversely impacted by this decision because they own hundreds of bridges that traverse navigable waterways in the United States, a significant number of which are subject to the Truman-Hobbs Act. For example, the Norfolk Southern Railroad (NS) and the Burlington Northern Santa Fe Railway (BNSF), respectively, own 136 and 115 bridges that cross navigable waterways; 16 NS bridges and 6 BNSF bridges have been subject to the Truman-Hobbs Act. Union Pacific Railroad, another large AAR member, owns 62 bridges over navigable waters, of which 4 have been subject to the Truman-Hobbs Act, with 3 currently being studied for potential coverage under the Act. The Illinois Central Railroad and its affiliates own 12 bridges over navigable waters. Of thirteen bridges

that are currently subject to a Truman-Hobbs Order to Alter, nine are owned by railroads.[2]

The event that gave rise to this case was not an isolated occurrence. Bridges that have been subject to Truman-Hobbs orders have been struck hundreds of times by marine vessels during the past two and a half decades. *See* Petition at 11. There is no reason to doubt that these accidents will continue at a similar clip for the foreseeable future. If the decision below is allowed to stand, whenever such an event occurs (at least when occurring within the jurisdiction of the Seventh Circuit), it will not only be more difficult for the bridge owner to recover for the damage done to its own property by the vessel, it also will expose the bridge owner to liability for the cost of damage to the vessel, hardly the result envisioned by the 76th Congress when it enacted the Truman-Hobbs Act.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of petitioner.

SUMMARY OF THE ARGUMENT

The Seventh Circuit's decision in this case misconstrues the Truman-Hobbs Act, which was enacted by Congress to provide federal funding for the alteration of bridges over navigable waters for the purpose of aiding navigation. The court held that qualification of a bridge for Truman-Hobbs funds has the effect of eliminating the century-old presumption in admiralty that when a moving vessel hits a stationary object (like a bridge), the moving vessel is at fault. This ruling is at odds with the purpose and intent of the

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[2] *See* Letter from N.E. Mpras, Chief, Office of Bridge Administration, U.S. Coast Guard to Michael J. Scotti (May 2, 2000)(providing information requested by petitioner from the Coast Guard pursuant to the Freedom of Information Act (FOIA Information). *See* Petition at 17.

Truman-Hobbs Act, which was to relieve bridge owners, who are predominantly railroads, from the unfair burden of having to pay for alterations to their property which aid navigation rather than the bridge owner. Not only does the legislative history fail to lend any support to the court's determination that the Act was intended to alter a long-standing rule of liability to the detriment of bridge owners, it makes abundantly clear that Congress specifically was concerned, as a matter of fairness, with rectifying an injustice in the existing law which required bridge owners to pay for such alterations. It is equally clear that Congress did not perceive the Truman-Hobbs Act as conferring a benefit on bridge owners (which might be offset by a burden), as the Act requires the bridge owner to be responsible for all costs associated with the alteration which might benefit the owner.

The court's erroneous reading of the Truman-Hobbs Act is particularly troubling to the railroad industry because it has the effect of forcing railroads to subsidize water carriers, a competing mode of transportation. Railroad bridges are frequently hit by marine vessels: in fact, a substantial number of these allisions involve bridges that have qualified for Truman-Hobbs funds. In these cases, the bridge owner will now likely be financially responsible for both the damage caused to its own property by the vessel, as well as any damage to the vessel. The unwarranted reversal of a rule of liability by the court below will lead to payments from railroads to water carriers as a direct result of the Truman-Hobbs Act. This decision, which crafts a subsidy of one mode of transportation by a competing mode, which was never contemplated nor intended by Congress, should be reviewed by this Court.

ARGUMENT

I. THE DECISION BELOW IMPROPERLY FORCES BRIDGE OWNERS TO SUBSIDIZE USERS OF NAVIGABLE WATERWAYS, A RESULT DIRECTLY CONTRARY TO THE PURPOSE OF THE TRUMAN-HOBBS ACT

In 1940, Congress sought to relieve railroads and other owners of bridges over navigable water from a "harsh rule" which forced them to pay for alterations to their property which provided them with little or no benefit. Sixty years later, the Seventh Circuit, without direction from Congress, has devised its own harsh rule of liability that will strongly encourage bridge owners to bear precisely the costs the Truman-Hobbs Act was intended to prevent.

The Seventh Circuit speculates that since the Truman-Hobbs Act grants benefits to bridge owners, it must also impose burdens. *I&M Rail Link, LLC v. Northstar Navigation, Inc.*, 198 F.3d 1012, 1015 (7th Cir. 2000)("[t]he Truman-Hobbs Act . . . is a complex deal, with some features making life easier for the proponents and other features attaching prices."). This burden, the court of appeals presumes, is the eradication of the presumption, established by this Court in *The Oregon*, 158 U.S. 186 (1895), which states that when a moving vessel collides with a stationary object there is a presumption that the stationary object was not at fault and that the moving vessel caused the accident. (As petitioner explains, it is a pragmatic, logical and equitable rule. *See* Petition at 13-14.) Yet the statutory language and legislative history are devoid of any support for this notion. Both the statute and the legislative history make clear that Congress did not perceive the Truman-Hobbs Act as conferring a benefit on bridge owners, as the bridge improvements to be covered by federal money were not for the benefit of the bridge owner. Thus, any "offsetting" burden the Seventh Circuit reads into the law is wholly

gratuitous. Morever, notwithstanding its views on the equities, a lower court is not free to offset a putative benefit (for example, by deeming a common law rule of liability abrogated) in the absence of a strong indication that it was Congress' intent to do so. *See* Petition at 25.[3]

A. In Enacting the Truman-Hobbs Act, Congress Meant to Relieve Bridge Owners of the Obligation to Finance Bridge Alterations That Were Designed for the Benefit of Navigation

Notwithstanding the Seventh Circuit's insistence that it was merely recognizing an implicit bargain that resulted in the 1940 legislation, its decision, in fact, upends the legislative purpose of the Truman-Hobbs Act. As a consequence of the decision below, the owner of a bridge that has qualified for Truman-Hobbs funding would be considered to have created an "unreasonable obstruction to navigation," which, in turn, can lead to legal liability whenever such a bridge is struck by a moving vessel. This flies in the face of the essential purpose of the Truman-Hobbs Act, which is that the cost of alteration of bridges, to the extent it is for the purpose of aiding navigation, is to be borne by the public rather than by the bridge owner.

Examination of the legislative history of the Truman-Hobbs Act reveals that the underlying purpose of the legislation was to relieve bridge owners, frequently railroads, from the unfairness of the then-existing law. At the time, if the government ordered alterations be made to a bridge in order to aid navigation, the owner was required to bear the full cost. As one supporter of the bill explained, "[t]he purpose of this bill was to relieve bridge owners of this harsh rule which requires owners to alter bridges at their own

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[3] *United States v. Texas*, 507 U.S. 529, 534 (1993); *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983)

expense, whether or not they receive any benefit from the alteration . . ." 86 Cong. Rec. 8647 (1940)(statement of Representative Lea).

Virtually every member of Congress who spoke in favor of the bill echoed this sentiment. Representative Culkin opined that "I think [the railroads'] rights are definitely and unfairly invaded under the present law and this legislation offers a positive cure in the situation." 86 Cong. Rec. 8650 (1940). Representative Miller added that the bill "corrects a mistake that was made years ago . . ." *Id.* Representative Dirksen noted that "it would be unfair to assess a railroad, for instance, if they received no benefit." *Id.* Finally, Representative Crosser explained that the mere fact that existing law apportioned burdens on bridge owners far exceeding the benefits conferred did not justify opposition to the bill: "If existing law is wrong, that is why it should be replaced." *Id.*[4]

Members of Congress went to great lengths to dispel any notion that the bill would grant a benefit or subsidy to bridge owners. The bill made the bridge owner responsible for all costs and expenses that arguably would result in a benefit to the bridge owner, a feature that remains part of the law. *See* 33 U.S.C. §516; *see also* statement of Representative Hobbs.

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[4] President Roosevelt had vetoed the legislation, and numerous members of his party made the difficult decision to override the veto in order to pass important legislation, grounded in both the national interest and equity. As Representative Hobbs pleaded with his colleagues:

> With the sincerest admiration for our great President, with genuine regret that agreement with him on this point is impossible, I beg you to serve national defense, relieve unemployment, *be fair to the railways*, and , therefore, pass this perfectly meritorious bill over his veto.

86 Cong. Rec. 8653 (1940)(emphasis supplied).

86 Cong. Rec. 8653 (1940).[5] It was well understood that funds that were to be released under the Truman-Hobbs Act were solely for the purpose of aiding navigation. Representative Hobbs explained: "Bear in mind: the basis of the order for the improvement is the needs of navigation. Therefore, since a perfectly good railroad bridge, adequately serving railway needs, is to be remodeled solely because of the needs of the competing carrier, it is manifest that navigation should be taxed with an equitable share of the cost." 86 Cong. Rec. 8654 (1940). Thus, the Seventh Circuit's premise that bridge owners must be willing to accept the price that comes with a government subsidy is off base because the Truman-Hobbs Act simply never has and still does not provide a subsidy of any kind to bridge owners.

B. The Decision Below Improperly Shifts Responsibility for Allisions from Moving Vessels to Stationary Objects, Unjustly Forcing Railroads to Subsidize Their Competitors

Though Congress was clear that the Truman-Hobbs Act was adopted to promote fairness, not a subsidy, to bridge owners, the Seventh Circuit has crafted its own subsidy: in this case from one mode of transportation to a competing mode. While trucking companies are the primary competitors of railroads, where navigable waterways exist--primarily along the Mississippi River and the rivers that feed into the Mississippi–barge lines also compete vigorously with railroads, particularly for bulk commodities like coal and grain, which constitute an important part of the railroads'

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[5] "[T]his bill requires that there should be charged up against the railroad all benefits that flow to the railroad company from the improvement . . ." Representative Hobbs added that "the bill is sound, fair and altogether equitable. It charges every proper element of cost against the railways which should be borne by them." 86 Cong. Rec. 8654 (1940).

business.[6] Eliminating the presumption established by *The Oregon* grants an unwarranted advantage to water carriers at the expense of railroads, shifting a balance that already is tipped in favor of railroad competitors by virtue of the existing federal subsidy structure.

The rail industry is unique among transportation modes in that its rights-of-way are not constructed and/or maintained with public funds. Railroads own the tracks and roadbeds on which their trains travel, for which they are financially responsible (and on which they pay property taxes). In 1998 alone, Class I railroads invested nearly $5 billion in their roadways and structures.[7] In contrast, primarily through the U.S. Army Corps of Engineers, the nation's inland waterway system, which provides the infrastructure of the barge lines and other inland water carriers, is built, operated, maintained and improved with public money.[8] Around $800 million is spent annually by the federal government on these functions, with only about 10 percent being covered by taxes paid by the commercial users of the waterways.[9]

While the equity of government aid to the various components of our nation's transportation industry is a matter

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[6] In 1998, coal traffic accounted for about 23 percent of rail revenue; grain traffic accounted for 6.5 percent. Association of American Railroads, *Railroad Ten-Year Trends, 1989-1998* at 51, 54 (1999).

[7] Association of American Railroads, *Railroad Facts* 43 (1999 ed.).

[8] The federal government also builds and maintains a system of highways that are used by the trucking industry; airports and the air traffic system are largely funded with public money.

[9] *See* Congressional Budget Office, Paying for Highways, Airways and Waterways: How Can Users be Charged? 53 (1992). While these specific figures are from the early 1990s, the relationship between federal spending and user contributions has remained about the same. *See e.g.*, U.S. Army Corps of Engineers, *The 1997 Inland Waterway Review* (1997); Budget of the United States, FY 1997.

to be taken up by Congress rather than the courts, this Court should not sit idly by when a lower court has erroneously exacerbated the existing inequity. Railroad bridges that traverse navigable waters, though constituting a small portion of the rights-of-way which the railroads own and maintain, frequently are damaged in allisions with water carriers. Moreover, a high proportion of the bridges hit have been subject to Truman-Hobbs orders. *See* Petition at 11. While in some cases the damage is minor, the total cost to repair this vital railroad property runs into the millions of dollars. Since it is rare indeed for a bridge to move into the path of an oncoming vessel, the rule of *The Oregon* has at least facilitated the ability of bridge owners to recover their losses.

The ruling below vastly changes the equation. Now, railroads risk not only losing their ability to be compensated for the damage done to their property, but also of being found liable for any damage caused to a moving vessel when that vessel fails to avoid hitting the bridge, even though its position had been fixed, and well known, for many years.[10] Shifting the cost of these accidents from vessel owner to bridge owner results in a subsidy by railroads paid to their direct competitor, the water carriers. Moreover, in many cases, the potential for this subsidy will continue for a long period of time, as many years may go by between the time an "Order to Alter" is issued and all the government funding required to complete the work has been made available by Congress and released.[11] Were this result mandated by the

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[10] While the bridge owner brought the action in this case, the barge line filed a counterclaim seeking recovery for the damage to its vessels.

[11] *See* FOIA Information. In six of the thirteen pending Truman-Hobbs projects, the order was issued prior to 1995. In most of these cases, the vast majority of the funding is to come from the federal government, giving the bridge owner little control over the timing of the project. For example in the case of one bridge, the order was issued on April 1, 1991, yet as of last month only $1.2 million of $39 million has been made

statute, it might properly be considered a cost of doing business. However, in enacting Truman-Hobbs, it is clear that Congress did not intend to give with one hand and take away with the other.

This Court has looked askance at governmental efforts to require railroads to subsidize competing transportation modes. *See Nashville, C. & St. L. Ry. v. Walters,* 294 U.S. 405 (1935). In that case, the state of Tennessee had ordered a railroad to construct and pay half the cost of an underpass to separate grades where a proposed federal aid highway was to cross the railroad's main line. This Court did not take issue with the general concept that under the state's police powers it could require railroads to fund grade crossing separations. However, this Court remanded the case to the Tennessee Supreme Court, because that court had refused to consider special circumstances which raised serious constitutional questions about the state's action.

Of specific significance was the fact that the financial obligation that was being exacted from the railroad was for improvements which appeared not to benefit the railroad, but instead to favor its direct competitors. This Court noted, that unlike in the past where railroads benefitted from grade crossing separations, "[t]he effect upon the railroad of constructing federal aid highways . . . is entirely different." *Id.* at 423. This Court went on to explain the impact on the railroad:

> [federal aid highways] deplete the existing rail traffic and the revenues of the railroads. Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible of traffic interruptions incident to crossing at

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available by the government, with the project not expected to be completed until 2003.

> grade are now of far greater importance to the highway user than it is to the railroad crossed.

Id. at 423-24. In short, this Court found troubling a scheme which required a railroad to subsidize the separation of its lines from the highways when "[p]ractically all vehicles moving upon [those highways] will directly or indirectly compete for traffic with the railway." *Id.* at 426.

Just as this Court was skeptical about an administrative decision that forced a railroad to pay for infrastructure improvements that benefitted its direct competitor, it should be equally skeptical of a judicial decision that construes the Truman-Hobbs Act as a mechanism for shifting liability from water carriers to railroads.[12] Water carriers will no doubt seize on the ruling below to avoid the rule of *The Oregon* and contest efforts by bridge owners to recover for damage to their bridges. In place of the existing system of resolving disputes by negotiation, the Seventh Circuit's decision will lead to increased litigation over the issue of how to allocate liability. Most assuredly, the court's misuse of the Truman-Hobbs Act will make more likely a transfer of wealth from railroads to a competing mode of transportation.[13] This Court should review the decision which is responsible for this result, never intended nor envisioned by Congress.

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[12] Representative Hobbs opined that bridge owners had an even stronger case for relief than did the railroad in *Walters*. 86 Cong. Rec. 8654-55 (1940).

[13] The Seventh Circuit asserts that under its holding it will simply be left to the jury to determine which party was responsible for causing an allision. However, the court's suggestion that once a Truman-Hobbs "Order to Alter" has been issued the bridge owner is in violation of 33 U.S.C. §512, may bring into play the rule of *The Pennsylvania*, 86 U.S. 125 (1873). This presumption against owners of bridges that are in violation of a statute will greatly increase the likelihood that the bridge owner will be required to bear at least some of the cost of any allisions.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Seventh Circuit be granted.

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